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ENVIRONMENTAL JUSTICE AND GLOBALIZATION: PUTTING A FOCUS ON INDIGENOUS PEOPLES AND LOCAL COMMUNITY RIGHTS AND PERSPECTIVES

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ABSTRACT

The right to participate in matters of local importance for communities as well as for Indigenous Peoples are increasingly recognized. This article analyses the continuous existence of deterrents to environmental justice from the perspective of social leaders who have worked in the defence of environmental and Indigenous rights in Colombia, Peru and Chile. This article argues that community rights and interests are relegated as a consequence of notions of development that are solely based on economic growth. This lack of a proper balance between a market-driven vision of development with local and Indigenous perspectives of development is manifested in different obstacles to effective participation and could also be explained by post-colonial dynamics. The research identifies seven particular obstacles that environmental and Indigenous rights defenders face to make their voices and perspectives be heard, namely: a total denial to binding mechanisms for participation, lack of information and transparency surrounding projects with a significant impact to local environments, unwillingness of State actors to supervise extractive industries, lack of access to environmental justice, lack of recognition by local authorities, in particular of Indigenous representatives, deception to the agreements between mining companies and the local communities as well as bureaucratic practices and judicial persecution, stigmatization and threats to the lives of environmental and Indigenous leaders.

Keywords: Right to participation; Indigenous rights; Community rights; Environmental rights; Inter-American Court of Human Rights; Neoliberalism

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Environmental Justice and Globalization: Putting a Focus on Indigenous Peoples and Local Community Rights and Perspectives

1. INTRODUCTION

There is a common understanding of what the right to participation entails following international rights instruments. For instance, in General Comment 25 (57) of the Human Rights Committee of the United Nations, the Committee emphasizes on the rights to public debate/dialogue and to organize, as part of the right to participation, contained in the International Covenant on Civil and Political Rights.[1] The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[2] addresses the topic of participation rights for Indigenous Peoples more specifically. Article 10 and 18 of UNDRIP acknowledges the right of Indigenous Peoples to give their free, prior and informed consent (FPIC) in case of relocation and the right to participate in decision-making matters that affect their rights.

The Inter-American Court of Human Rights has assessed its jurisprudence having conditions be met to consider that participation of Indigenous Peoples is meaningful, and, thus, Indigenous rights have been fully protected. The jurisprudence of the Inter-American Court of Human Rights has had an impact in the development of this right in the region falling under its jurisdiction. Among these developments, it is relevant to mention the case of the *Saramaka people v. Suriname*[3]. In this decision, the Court concluded that Indigenous peoples have the right to be consulted in a process that guarantees effective participation for the members of the community. This consultation has to follow the decision-making customs and traditions of the community and should be conducted in good faith. This implies that the process has the aim of reaching an agreement between the State and the community.

The right to participation that Indigenous Peoples have in the different environmental and social issues goes hand in hand with the realization of the right to self-determination. Among the different aspects included in the right to self-determination, it is relevant to highlight the need for guarantees of cultural identity, control of natural resources and the respect to and protection of the different forms of free expression and protection of collective identity and dignity[4]. These aspects were highlighted by UNESCO Expert Conference on the Implementation of the Right of Self-Determination[5] as a Contribution to Conflict Prevention are of a vital importance not only for Indigenous groups' existence but also to

1 Human Rights Committee, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights (1996), Adopted by the Committee at its 1510th meeting, UN Doc. CCPR/C/21/Rev.1/Add.7.

2 United Nations Declaration on the Rights of Indigenous Peoples (2007), <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>, accessed 30 November 2023.

3 *Saramaka People v. Suriname*, Inter-American Court of Human Rights, November 28, 2007, para. 133.

4 Van Walt van Praag, M., 'The implementation of the right of self-determination as a contribution to conflict prevention' (1998), UNESCO Report of the international conference of experts held in Barcelona from 21 to 27 November 1998, Barcelona, 1999, pp. 9–22.

5 <https://digitallibrary.un.org/record/354875?ln=en>

local communities directly affected by the deterioration of their living conditions.

For the former group, respect for cultural identity is essential for their preservation as a distinctive group. Indigenous Peoples share in common the impact of colonialism over their cultures connecting their past and present. As a product of a historical past of invasion, subjection and, in some cases, extermination, the Indigenous groups struggle to preserve their identity and existence as people, since they found themselves as a non-dominant group within the society[6]. The risk of disappearing because of violence or gradual assimilation remains present as a consequence of the historical conditions mentioned above as well as their present status as a minority. A case in point of this negative phenomenon in Northern Europe is the "Norwenization" process of the Sami people. Under these policies the Norwegian government promoted the discrimination and forced assimilation of the Sami people through different measures, which included the prohibition of their languages[7]. Norway publicly apologised for the sufferings caused by these policies and its ill effects to the Sami people[8].

The case mentioned above exemplifies the central role of cultural identity in the protection of the right to self-determination. Assimilation processes of cultural minorities equate in some cases to an attempt to cultural erasure by not recognizing the distinctiveness of a minority group and putting barriers to the exercise of their cultural autonomy[9]. According to this reasoning, a legal provision such as imposing a language requirement to have access to certain rights, which may appear at first glance as neutral, could be discriminatory in nature. This reasoning is followed by the European Court of Human Rights in the cases concerning indirect discrimination. This human rights tribunal indicates that the general norms having disproportionately negative effects on a group of people actually breach the European Convention on Human Rights. For instance, in the verdict for *D.H. and others v. the Czech Republic*, the legal norms in question did not take into consideration the particularities and special characteristics of Roma children in the education field. This resulted into a State of racial discrimination and a violation of Article 14 of the European Convention on Human Rights.[10]

Unfortunately, the cases of forced assimilation and challenges to the right to self-determination could be a negative side-effect of globalization

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6 Martínez Cobo, J., 'Study of the Problem of Discrimination against Indigenous Populations' (1986), E/CN.4/Sub.2/1986/7/Add.4, p. 379.

7 Kvile, R., 'Norway's indigenous people: From assimilation to recognition' (2020), Arctic Festival, <https://arktickyfestival.cz/en/2020/09/09/norways-indigenous-people-from-assimilation-to-recognition/>, accessed 03 December 2023.

8 Minority Rights Group International, 'State of the World's Minorities and Indigenous Peoples 2012- Case Study: Sami rights to culture and natural resources' (2012), p. 185.

9 Supra note 5, p. 24.

10 D.H. and others v. The Czech Republic, European Court of Human Rights, November 13, 2007, paras. 200-210. <https://www.escr-net.org/caselaw/2017/case-dh-and-others-v-czech-republic-app-no-5732500-grand-chamber-final-judgment-13>, accessed 30 November 2023.

processes. For instance, this research article discloses how, in environmental conflicts surrounding extractive projects, States have resorted to set draconian conditions to recognize groups as members of Indigenous groups. Such strategy aims to circumvent an obligation on State to respect Indigenous people's rights to self-determination and identity.

Furthermore, the 2007 UNDRIP emphasizes the importance of due respect of Indigenous customs as an integral part of the legal protections these groups should have. The Article 26 of UNDRIP acknowledges that due respect to the customs, traditions and land tenure systems of the Indigenous peoples should be an important aspect of the legal recognition of Indigenous territories. In this order of ideas, legal provisions would be insufficient to protect Indigenous people's rights if they ignore their customs and traditions even if they include mechanisms for these groups to have access to the lands they own or occupy.

The ramifications of this provision could be challenging for some States. The recognition of different customs and a different legal systems based on traditions dating before colonization processes took place would necessarily lead to a tacit acceptance of multinational, multi-ethnic States. This recognition would require a level of autonomy in their territories for their own institutions to regulate their own matters. This idea is, nevertheless, still contested in States in which these concepts are interpreted as the first step on a "slippery slope" towards independence or a weakening process of national sovereignty. The 2022 constitutional process in Chile can help illustrate this reaction. According to the rejected project for a new constitution of Chile, the country would have been defined as a "multinational and intercultural State" that recognized at least 11 Indigenous peoples and granted political autonomy to Indigenous Regional Autonomies.

Furthermore, the constitutional proposal recognized the authority of the Indigenous own legal systems, clarifying that they must respect the constitution, international treaties and that their decisions can be appealed to the Supreme Court[11]. However, this concept was rejected by a meaningful group of citizens within Chilean society. According to a poll conducted before the constitutional proposal was voted, 72% of the people preferred the concept of a "multicultural society by a single nation" against the concept of a "multinational State".[12] In this order of ideas, respect for cultural identity on its whole dimension could be wrongly interpreted in two different manners: considering it as an existential threat to national sovereignty or, on the other side of the spectrum, as a

[11] Arts. 34, 187.2, 309, 322 'Proposal- Political Constitution of the Republic of Chile' (2022), <https://chileconvencion.cl/wp-content/uploads/2022/07/Texto-Definitivo-CPR-2022-Tapas.pdf?fbclid=IwAR0GQA4GzJ907YosIuQipdd2R1uRKtQTwKQiKN0N66sJmib1q9oogh2qUCE/>, accessed 03 December 2023.

[12] Cadem, 'Plaza Pública Cadem Poll, Fifth Week of March 2022, Study 429' (2022), <https://cadem.cl/wp-content/uploads/2022/04/Track-PP-429-Marzo-S5-VF.pdf>, accessed 03 December 2023.

performative exercise by which these groups are granted a space to participate according to the law, but their perspectives are taken into account as a matter of form not in actual spirit.

Accordingly, the aim of this article is to explore the impact of participation and cultural rights as well as the right to access to environmental justice and its implications in different countries that recognize these rights for their Indigenous communities in first place and for local communities in second place. The research questions in this article will address the following:

- How does the State through its different institutions weigh different cultural perspectives of Indigenous groups? This includes respect for the uniqueness of their legal institutions and legal concepts such as the concept of property and of environmental justice, and
- How effective are the current legal provisions granting the aforementioned rights for Indigenous groups and local communities affected by projects impacting their environment and natural resources?

In the case of Indigenous peoples, historical oppression and colonialism exacerbate the negative consequences changing the environmental conditions of the places they live in. Notwithstanding, Indigenous and local communities' historical contexts are different, there are also common concerns and challenges to their existences, customs and cultural distinctiveness. The rights to live in a healthy environment, dignity, self-determination, participation, economic and cultural rights among other rights are at risk in both the cases. Namely, some of the challenges brought by globalization processes and, more specifically, the neoliberal conception of economic growth undermine these rights as it is later discussed in this article.

In order to answer these questions, the author interviewed members of two different NGOs in Colombia and Peru who have worked on the defence and protection of human rights for their communities. A researcher in Chile was also interviewed. The NGO "Frente de Defensa del Valle de San Lorenzo y Tambogrande" in Peru was involved in the defence of the rights of the communities in the Tambogrande area. The organization also defended the right to healthy environment, Indigenous and environmental rights in Peru. The "Colectivo Socioambiental Juvenil de Cajamarca" is a Colombian NGO, which actively participated in a local consultation in the city of Cajamarca of Colombia to oppose the continuation of mining processes taking place in their city. It continues advocating for the right to participate for Indigenous and local communities, in their region and at the national level, for the approval of a public participation act aiming to further protect such rights. Additionally, Vicente Ramdohr Arellano is a journalist and researcher; he is author of a research study on the case of the Aconcagua River in the national context

of Chile, where water resources have the constitutional status of private property and how this affects the right to access to water.

The purpose of these interviews is to get a better understanding of the negotiation process between communities and the authorities, the weight of Indigenous and local rights and perspectives in administrative or judicial decisions. Furthermore, the interviewees identified current obstacles for the full realisation of environmental rights. This article explores the different interpretations between decision bodies and communities on the principles guiding the right to cultural identity and participation on environmental issues for indigenous communities.

2. ENVIRONMENTAL JUSTICE BETWEEN GLOBALIZATION AND THE PERSPECTIVES OF INDIGENOUS GROUPS AND LOCAL COMMUNITIES

The right to participation in a meaningful way is a complex process. The existence of meaningful participation mechanisms is a sign of stronger democratic systems. In order to assess whether participation mechanisms are effective or not, it is relevant to consider some of the factors that affect communication between the parties in contention in general. Namely, the State and other private actors should be aware and respect the cultural differences among the groups involved. Historical power dynamics have affected social legitimacy of the State institutions including the judiciary. Accordingly, the notion of Indigenous and community institutions and how they are perceived would have an impact on how the rights and legitimate interests of these groups are weighed against other interests in contention.

It is pertinent to take into account the concept of globalization put forward by Manfred Steger.[13] In his book *Globalization: A Very Short Introduction*, Steger identifies some distinctive characteristics of globalization as a set of social processes. In short, globalization creates an environment allowing certain activities to overcome traditional political, economic, cultural and geographical boundaries. It should also be noted that, as a product of the acceleration of social exchanges and activities, what is considered "local" and "global" are interrelated. Notwithstanding the latter statement, some of the characteristics mentioned above would conflict with the purpose of putting a focus to Indigenous perspectives. For instance, the opportunities to participate in environmental decisions are most likely limited to the boundaries of domestic political systems. In this order of ideas, the defence of communities, in particular Indigenous groups, could be characterized as a resistance from "the local" and the "traditional" against the "global" interests in these exchanges. This consideration would not necessarily mean that such interests are irreconcilable. However, the mechanisms in place and how they are

[13] Steger, Manfred B., 'Globalization: A Very Short Introduction' (2020), 5th edn, Very Short Introductions (Oxford, 2020; online edn, Oxford Academic, 28 May 2020), pp. 9-12.

implemented illustrate whether the different points of views are properly pondered and can shape the way an extractive project is executed or, on the opposite, if these mechanisms are ignored or circumvented at any stage of the process.

Secondly, the concept of neoliberalism is closely related to globalization. The neoliberalism is an economic model that advocates privatization, market liberalization and deregulation of the markets.[14] It is particularly these aspects that reduce the role of the State to a mere arbitrator, that make some authors question the compatibility between neoliberal policies with democracy (Brown, 2003).[15] According to Brown (2003), democratic institutions and values are at odds with economic competitiveness in particular or a neoliberal system in general since the latter would subject rights to a cost-benefit analysis. Hence, a country can be nominally democratic and abide by democratic standards while having a neoliberal economic model. However, there will eventually be a conflict between the principles and values encompassed by these two systems.

For instance, the conflicting interests between mining companies and Sámi communities in northern Finland can illustrate the difficulty to reconcile economic interests of the State and the stakeholders including Indigenous groups and local communities. According to the Geological Survey of Finland, there are mineral deposits of nickel, copper, vanadium and cobalt, which are needed for the production of vehicles. However, their extraction is perceived as a threat to the traditions and way of living of the Sámi Indigenous peoples. In the words of Sámi campaigner, Minna Näkkäläjärvi, "It's not possible for reindeer husbandry and mining to co-exist in the same area (…). This isn't only about a job, reindeer is our culture, our lifestyle (…). I don't know which metals they found, but I don't think the world will be a happier place without our Sámi reindeer herding culture".[16] Conversely, the extraction of the said minerals is of vital importance for the production of electric vehicles, which represents an ever-growing market that has been deemed crucial towards the fight against climate change (International Energy Agency, 2022).[17]

In this scenario, it would be ideal that the economic interests of the State and the companies take into consideration the voices of dissent in their development projects attending to the principles of sustainable development. However, in a scenario guided by a neoliberal agenda,

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[14] Duggan, L., 'Twilight of Inequality? Neoliberalism, Cultural Politics, and the Attack on Democracy' (2003), Beacon Press, Boston.

[15] Brown, W., 'Neo-liberalism and the End of Liberal Democracy' (2003) 7(1) Theory & Event 46-48. <https://doi.org//10.1353/tae.2003.0020>

[16] Nilsen, T., 'Miners hunting for metals to battery cars threaten Sámi reindeer herders' homeland' (2020), The Barents Observer, <https://thebarentsobserver.com/en/node/7082/>, accessed 03 December 2023.

[17] International Energy Agency, 'By 2030 EVs represent more than 60% of vehicles sold globally, and require an adequate surge in chargers installed in buildings' (2022), IEA, Paris <https://www.iea.org/reports/by-2030-evs-represent-more-than-60-of-vehicles-sold-globally-and-require-an-adequate-surge-in-chargers-installed-in-buildings/>, accessed 03 December, 2023.

economic growth would prevail over other legitimate interests from the most affected groups by decisions directed to their local environments and community lives. This conclusion is shared by Vicente Ramdohr Arellano in his analysis of the Aconcagua River case study.[18] According to the 1980 Political Constitution of the Republic of Chile approved under a military dictatorship that remains fully in force, water is considered a commodity. One of the implications of this legal status is that access to water as a human right is limited by economic interests, and businesses are only obliged to grant access to the bare minimum of water a person needs to be alive. Anything beyond this minimum level of water, including access to water for showering or gardening, is not considered a basic necessity and, thus, is not legally guaranteed. All such things make people dependent on market forces often controlling the prices. Moreover, there are private companies operating as private monopolies in charge of water sanitation for human consumption. These companies receive water for free from the State and are allowed to sell it to the people who want to have access to water.[19] As a consequence, water is treated as a commodity in the market.

Evidently, in Chile a company can take ownership of the water supply of a valley as long as it can afford to pay for it, and provides people the required amount of water for direct consumption[20] One of the consequences of subjecting the right to access to water to economic interests and the forces of the market is that the rights of communities to participate and be taken into consideration in decisions that affect their own existences, well-being and any potential affectation to their environments depends on the goodwill of the companies who own water resources. Furthermore, in this case the link between water and the environment is not considered. In the words of Ramdohr Arellano, "Trees are fed by the river because there is no one that needs this water to produce something. And, when someone needs to use this water, these trees are going to disappear. Since water is life, all these places will live until a business needs to use their water. There is a river nearby called Putaendo where a minimum quantity of water is allowed to flow around it. However, this was a conscious decision of the owners of the river to prevent that the ecosystem dies. Notwithstanding this collective decision from these people, they could perfectly not allow it and let the ecosystem die because regulations are minimal and they are not often complied".[21]

In a similar fashion, Juan Edwin Alejandro Berrospi, who is the coordinator of the technical, environmental team of Muqui, points that economic interests become a dominating force over the rights of local and indigenous communities and their interests in Peru. Muqui is a network in Peru that worked in the landmark case of Tambogrande. In 1996, Canadian

[18] Ramdohr Arellano, Vicente, personal communication, December 14, 2022.
[19] Larraín, S., 'El agua en Chile: entre los derechos humanos y las reglas del mercado' (2006) 5 (14) Polis Journal Bolivariana University.
[20] Cantillana, R., 'Water research in Chile: review and critical perspectives' (2020), In: Tecnología y ciencias del agua 11(6), Instituto Méxicano de tecnologías del agua, 81-126, pp. 96- 104.
[21] Supra n.18

mining company Manhattan Minerals wanted to start exploration activities in Tambogrande (Peru). The local community voiced their dissent against this project that was take place in a fertile valley to cultivate lemons and mangoes of export quality. The process, however, was not peaceful. Environmental activists and social leaders were persecuted and even killed. For instance, during the debates of the project, one of the specialists who opposed this project, agricultural engineer Godofredo García Baca, was assassinated after he raised the question of the negative effects this project would have on the quality of water, air, lands and the lives of the local population (Herrera, 2021).[22] Unfortunately, the assassination of environmental activists or the use of intimidation against them is not uncommon in the region. According to the 2021 report on environmental defenders worldwide by Global Witness, at least 33 land and environmental defenders had been killed including Indigenous leaders in Colombia.[23]

In 2002, the community of Tambogrande organized a citizen consultation over the viability of the mining project. As a result, more than 95% of the population voted against this project. The Tambogrande case is considered one of the most successful cases of participation rights as a means to oppose mining projects which may have negative effects on the local populations. However, environmental litigation is a never-ending process. According to Juan Edwin Alejandro Berrospi, environmental organizations have been met with indifference when they have engaged with multinational companies. The right to life and the effects on the living environment of local communities are ignored.[24] As a result of this apathy, environmental activists in Peru have shifted their strategy to international forums including the Inter-American Commission of Human Rights, the United Nations and the European Union. The aim of this international strategy is to denounce the abuses committed by transnational companies. In the latter case, Juan Edwin Alejandro Berrospi highlighted the importance of adopting the EU Directive on corporate sustainability due diligence[25].

The proposed directive aims for transnational companies to comply with basic human rights in their operations. Companies will be required to identify, prevent, end, or mitigate the impact of their activities on human and environmental rights. This Directive is, therefore, consistent with the green transition goals set by the European Union (European Commission, 2022).[26] Bearing in mind globalization processes in terms of environmental

[22] Peña Herrera, N., 'Godofredo García Baca: 20 años después, su legado sigue vivo' (2021), <https://www.cutivalu.pe/godofredo-garcia-baca-20-anos-despues-su-legado-sigue-vivo/>, accessed 03 December 2023.

[23] Global Witness, 'Decade of defiance. Ten years of reporting land and environmental activism worldwide' (2022), September 2022, p. 13.

[24] Berrospi, Juan Edwin Alejandro personal communication, September 22, 2022

[25] <https://commission.europa.eu/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en>

[26] European Commission, 'Just and sustainable economy: Commission lays down rules for companies to respect human rights and environment in global value chains' (2022),

responsibility, the approval of a Directive on corporate sustainability due diligence would be a step in the right direction to protect the rights of the communities most affected by mining and other activities with a potential negative impact on the environment and their rights. According to Berrospi "it is necessary to understand which buy raw materials that go from Peru to Europe (…). For instance, there are German companies buying gold and copper and it is important to know which are these companies, to whom are they buying raw materials and under which conditions they operate".

In the one hand it has been observed in both cases the unwillingness of the State to supervise if mining companies, as well as other industries that require significant amounts of water, are overusing water resource.[27] This would include water resources that were supposed to be used to fill water reservoirs that could have been used instead for avocado cultivation in the case of Chile.[28] On the other hand, citizens have had to supply this lack of diligence from the State to exercise public oversight on these companies via litigation or the organization of local consultations. In both the cases, the pervasive influence of a neoliberal logic in the interpretation of human rights is observed.[29] From the perspective of procedural justice, the Chilean constitutional and legal framework leaves communities the most unprotected in terms of access to environmental justice. For instance, judicial defence of the right to access to water are often performed from the perspective of contractual law in order to have higher chances of having a positive decision. In any case, private companies have a strong degree of protection under domestic law.[30]

McCauley and Heffron identified three dominant dimensions of environmental justice: procedural, distributional and restorative justice.[31] According to this theoretical framework, the cases of Colombia and Peru presented in this article reflect a situation in which environmental procedural justice is better satisfied compared to Chile. For instance, their judicial and legal systems include spaces for communities to organize and find a legal remedy to any perceived violation to their environmental rights.[32] Notwithstanding this, it must be reiterated that the State cases of Colombia and Peru analysed in this article reflect other serious threats to

<https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1145/>, accessed 03 December 2023.

27 La Oroya Community v. Peru merits report, Inter-American Commission on Human Rights, September 20, 2021.

28 Voller, L., 'Avocados and stolen water' (2017), Danwatch, <https://old.danwatch.dk/en/undersogelse/avocados-and-stolen-water/>, accessed 03 December 2023.

29 Libuy Loyola, Carlos Alberto, 'Acceso a la justicia ambiental en Chile, Observatorio sobre tutela judicial efectiva en la protección del medio ambiente' (2020), Universidad del Desarrollo, Santiago, 2020, pp. 43-45, 56-52.

30 Alemparte, B., 'Towards a theory of neoliberal constitutionalism: Addressing Chile's first constitution-making laboratory' (2022) 11 (1) Global Constitutionalism 83-109.

31 McCauley and Heffron, Just Transition: Integrating climate, energy and environmental justice' (2018) 119 (1-7) Energy Policy 1-4.

32 Ibid, p. 4.

access to environmental justice based on persecution against environmental activists, social leaders and Indigenous peoples. Paradoxically, threats to the lives and well-being of Indigenous peoples and environmental activists in these two countries become one of the most significant deterrents for the affected communities to find redress for any environmental harm committed to the individuals identified as victims (restorative justice) and to address inequalities caused by environmental harm (distributional justice) in spite of the existing mechanisms to have access to justice. Consequently, these threats need to be further discussed in a separate sub-chapter as they would represent a total denial of the right to access to environmental justice as well as the rights of Indigenous peoples and communities to participate.

Notwithstanding that, environmental conflicts over the use of land are necessarily connected to a historical and economical background; this state of affairs would exceed the ongoing discussion in the current sub-chapter which is mainly based in the link between globalization processes as an impediment to the full realization of environmental justice. In any case, McCauley and Heffron identify neoliberalism in a broader sense as a deterrent for the realization of the right to access to environmental justice. In the words of these authors, neoliberalism "has significantly added to societal inequality" and its instance on the neoclassical school of thought "dominates economic policy-making and this echoes with research done in the fossil fuel community".[33]

Are neoliberal economic models necessary at odds with the realization of the rights of Indigenous and local communities? There is a second interpretation of the role of neoliberalism in the disputes between the most directly affected communities and the economic interests of the States and companies willing to exploit natural resources. According to Lindroth, there is an argument from a neoliberal point of view to grant and protect to a certain extent the environmental and participatory rights. The logic behind this statement is that the neoliberalism is pervaded by cost-effectiveness rational.[34] In this order of ideas, granting autonomy to Indigenous groups and participation rights to the affected local communities is part of this cost-effectiveness calculation that would overweigh the costs of a state of permanent environmental conflicts.[35] Accordingly, neoliberal governance requires guaranteeing a degree of protection for environmental and community rights as well as Indigenous rights in order to be functional. Conversely, the aforementioned examples that outrightly deny the possibility for peoples to demand a protection to the authorities to have access to natural resources and to protect their local environment would be detrimental to the system as a whole in the long-term.

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33 Supra 29, p. 2.

34 Lindroth, M., 'Indigenous rights as tactics of neoliberal governance: practices of expertise in the United Nations' (2014), In: Social & Legal Studies 23 (3), 341-360, p. 342.

35 Ibid, p. 351.

Notwithstanding the latter, participation under a neoliberal system would be attached to certain limitations. In particular, the recognition of rights following the neoliberal market logic improving the lives of Indigenous peoples aims to limit more radical forms of activism. This dilemma has been present in discussions around the effectiveness of the different strategies to litigate and reclaim rights in Indigenous circles. For instance, Lightfoot acknowledges that, in order to litigate for their rights at the national and international level, Indigenous movements have to adopt the norms, jargon and modes of the institutions of colonizer powers. Effective litigation requires for these groups to acknowledge the scope of interpretation of the rights in contention in particular property rights, the right to access to water and environmental rights which are based in the western legal tradition and differ in many occasions with their own worldview and interpretation of these rights. However, the author characterizes it as falling under a "pessimistic trap" with the thinking that following this strategy is futile or counter-productive.[36] At the same time, offering remedy and economic compensation as well as limited access to land forces Indigenous and environmental movements to adapt to the current extractive system rather than to change it.[37] Following this logic, environmental justice becomes a post-colonial tactic for States to exercise power and control by offering a limited, economic efficient version of environmental, participation and Indigenous rights.

3. PUTTING A FOCUS ON INDIGENOUS PEOPLES AND COMMUNITY PERSPECTIVES

In the Inter-American System of Human Rights, Article 4 of the American Convention on Human Rights focuses on the right to life and the restriction to the death penalty.[38] However, the interpretation of Article 4 of the Convention has evolved in time with the decisions of the Inter-American Court of Human Rights. Particularly, the Court has interpreted Article 4 together with the obligation from States to respect and guarantee the rights under the Convention (Article 1.1 of the American Convention on Human Rights) and the prohibition to restrict the rights under the Convention to a greater extent than is provided therein (Article 29 of the American Convention on Human Rights) to develop the concept of the right to a Dignified Life or "Vida Digna".

As part of this jurisprudential development, the Inter-American Court of Human Rights has pointed out what conditions need to be met to protect the right to a dignified life. This has a significant importance for groups in vulnerable situations. According to the Court's previous findings in the *Yakye Axa* case, in order to meet the minimum requirements to protect the right to life under dignified conditions, it is imperative that

[36] Lightfoot, S., 'The Pessimistic Traps of Indigenous Resurgence' (2020), In: Pessimism in International Relations, Palgrave Studies in International Relations, pp. 165-167.
[37] Supra 32, p.353.
[38] Art. 4 American Convention on Human Rights (1969), Organization of American States.

conditions "impeding or obstructing access to a decent existence" are not generated.[39] Further, in the Xákmok Kásek case, the Court concluded that State assistance could not be sufficient to overcome a situation of vulnerability. Conversely, the lack of possibilities for an Indigenous community for self-sustaining in line with their traditions affects the right to life under dignified conditions.[40]

In order to protect the right of Indigenous people to life under dignified conditions, it is imperative to listen to their needs. However, the first obstacle the communities face to be listened is the lack of recognition by the state as members of their own communities. The reasons behind the exclusion of Indigenous and local communities' perspectives in environmental decision-making processes range from bureaucratic obstacles imposed to be recognised and have access to information, to other forms of deception to the implementation of the agreements reached after consultations have taken place and to persecution and threats to the lives of Indigenous and environmental activists in the worse cases. In summary, all the reasons expressed above could be explained as expressions of post-colonial dynamics that limit the possibility to put a focus on Indigenous peoples and their community perspectives.

For instance, Indigenous peoples have a right to be consulted under Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) before adopting measures that may affect them. In addition to this, Article 32 of the UNDRIP mentions the imperative of holding consultations before the approval of projects that may affect their territories, in particular in cases of mining or the use of water and other resources. Although these provisions may seem clear at first glance, the first question that can arise is: whom should the authorities consult among native and Indigenous communities? However, who is a member of an Indigenous community? The way this question is answered could be guided by a post-colonial rational when authorities decide unilaterally who members or groups are legitimate interlocutors. These incidents have been noted in Peru. According to Juan Edwin Berrospi from Red Muqui, there are four main conditions in order to be recognised as a member of an Indigenous community at the domestic level: to be a descendant from Indigenous people, to use an Indigenous language as a mother tongue, to maintain their practices and traditions, and to be part of the community. However, the way these conditions have been interpreted has been arbitrary. Namely, if a person perceives oneself as Indigenous but speaks Spanish or makes use of technological devices, his/her Indigenous identity could be put into question and, therefore, cannot be consulted. According to this interpretation that has been invoked "when we examine peasant

[39] Yakye Axa Indigenous Community v. Paraguay, Inter-American Court of Human Rights, June 17, 2005, para. 161.

[40] Xákmok Kásek Indigenous Community v. Paraguay, Inter-American Court of Human Rights, August 20, 2010, paras. 215-216.

communities in which mining projects are taking place, there would not be any Indigenous communities".[41]

In addition to this, access to information for Indigenous people or environmental activists is often restricted in detriment to the rights of the people who use this information to be consulted, to participate or to protest. In 2017, the Inter-American Court of Human Rights issued an Advisory Opinion on the State's obligations related to the environment in which it mentions the right to access to information. The Court says that information related to projects that may have an environmental impact is of public interest and it affects the full realization of other fundamental rights. Furthermore, States should be "actively transparent", which means that States should provide necessary, exhaustive and accessible information to the people to exercise other rights in particular when this information may have an impact on their rights to life, personal safety and health.[42]

The Inter-American Court of Human Rights referred to the connection between the right to access to information and environmental rights in *Claude-Reyes et al v. Chile*. This case centres on the refusal from the State to grant access to information related to a project for the exploitation of the Cóndor River. In this case, the Court reasoned that in order to fully enjoy the right to freedom of expression and have the possibility to carry out social control of public administration it was fundamental to have access to the information requested. As a result, restrictions to access to information should be fully justified and complied with the American Convention on Human Rights.[43] It should be emphasized that in this case, the requested information referred among other things to the environmental impact of the said project to the environment in general and in particular to Indigenous forests in the extreme south of Chile.

Limited access to information decreases the possibilities to participate in consultation processes. It has been reported that State authorities do not properly notify communities and concerned parties about the mechanisms to participate in the event of a project affecting the environment. For instance, events are not properly publicized through means of appropriate communication that are easily accessible for the communities. "Often consultations are imposed (…) when projects are needed to be approved and the communities learn about them, usually the legal period to express observations is already expired.[44] Another shape to limit these rights takes place when the granting of mining rights is accelerated through the simplification of these processes, making it harder for communities to be informed since legal timeframes to participate and object to the granting of mining rights are reduced. This was the situation

41 Supra 23

42 Inter-American Court of Human Rights, Advisory Opinion OC-23/17, November 15, 2017, paras. 214, 217, 221.

43 Claude-Reyes et al. v. Chile, Inter-American Court of Human Rights, September 19, 2006, paras. 99-102.

44 Supra 23

that took place in Colombia from 2000 to 2018 as a consequence of the approval of a new mining code in the country that allowed the government to grant mining rights via an "express proceeding".[45] In this case, the acceleration of the proceedings weakened the participation rights as well as the power of supervisory authorities to examine whether environmental regulations were complied with or not. This is of particular importance for mining projects that could have an impact on forestry reserves and conservation areas.[46]

Furthermore, another scenario that could become a denial to the right to access to information and participation takes place when the provided information or the agreed conditions attached to social licenses to operate are subsequently changed. As a consequence of these amendments to projects, if the changes are significant and change the conditions of the future activities, participation and consent becomes ineffective. In these cases, when communities were not previously consulted (in particular when changes increase the environmental impact of extractive projects), mechanisms for participation and to have access to information become a mere formality rather than legitimate instruments to protect community rights. These tactics are perceived by the community leaders as a form of deception because they put communities and environmental activists in a weak bargaining position. According to them, the impact on fragile ecosystems may be irreparable before a legal remedy may be achievable.

In addition to this, it has been reported as a common practice that officials in charge of approving amendments to the instruments for environmental management are offered jobs at the private sector for the companies that benefited from these amendments, a phenomenon known as "revolving doors".[47] Notwithstanding that, the existence of "revolving doors" between the public and private sector could be disputed, the perception that authorities are co-opted by the interests of transnational extractive parties and other private actors affect the legitimacy of institutional channels to discuss the concerns of the communities at the receiving end of the environmental impact of the said projects. Furthermore, judicial decisions are not exempt of social censure in contested decisions when they limited the rights of communities to voice their opposition and eventually to veto the projects affecting their local environments. For instance, in a 2019 decision, the Constitutional Court of Colombia concluded that, notwithstanding that communities have a right to participate and be consulted in matters that directly affect them, local referendums ("Consultas populares") could not be organized on the topic of mining. The reasoning behind this decision was that the central government has the exclusive competence to decide on the extraction of

[45] Iván Cepeda et al. v. Mines and Energy Ministry and National Mining Agency, Council of State, Bogota, August 04, 2022.
[46] Rojas, Yefferson personal communication, December 04, 2022.
[47] Supra n.23.

non-renewable resources.[48] In interview with environmental leader Yefferson Rojas, he stressed that, as a result of this decision, the perception from social and environmental leaders working in the field is that the judicial bodies are giving more relevance to multinational interests. Thus, there would not be guarantees for the communities to decide. Consequently, his environmental organization together with the community has proposed to "create more policies to develop environmental democracy". This would translate in the passing of a new law that should acknowledge to communities their right to freely decide in their territories without external influences in particular from multinationals on these matters.[49]

Finally, one of the reasons behind the lack of representation in spite of legal recognition to participation mechanisms to Indigenous communities and environmental leaders is the existence of threats to their lives. As it was mentioned above, environmental leaders are still a group at risk in Latin-America. According to the 2022 Global Analysis report by Front Line Defenders, in addition to the risk of being criminalized for their activities, environmental rights defenders and activists in the Americas "were exposed to persistent and alarming levels of violence by both State and non-state actors, including widespread killings". The report details different instances of violent threats and violent actions against environmental leaders, Indigenous groups and human rights defenders in the Americas. According to the report, in 2022 Colombia became once again the country in the region with the highest number of lethal attacks against human rights defenders.[50] Furthermore, in Colombia, environmental leaders are often stigmatized for their work. This practice does not only weaken participation processes but it additionally creates the perception that State and private actors do not give enough guarantees to Indigenous and social leaders to be heard. For instance, according to Yefferson Rojas, there was an instance in Cajamarca in which one of the representatives referred to the environmental leaders participating in a discussion table as the "guerrilla group from Cajamarca" in a private chat. In the context of a country that experienced an internal armed conflict of more than five decades, associating environmental leaders to guerrilla members is not only defamatory and demeaning but it is also a form of stigmatization. In this reported case, the chat was leaked by the local press. In the words of Rojas "after this day we concluded we had no guarantees to meet with this multinational that not only disrespected us but put our lives at risk".[51]

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48 Sanabria-Rangel, Á., 'Participation Rights vs. State and Property Rights in decisions affecting the environment: the Colombian case' (2020), In: Revista de la Facultad de Derecho de México LXX, 70 (276-1) (January-April 2020), pp. 5-34, Faculty of Law, National Autonomous University of Mexico, pp.58-59.

49 Supra n.44.

50 Front Line Defenders, 'Global Analysis 2022' (2022), April 04, 2023, pp. 34-44, <https://www.frontlinedefenders.org/en/resource-publication/global-analysis-2022/>, accessed 03 December 2023.

51 Supra n.44.

"I think that the chances of dying (as a consequence of being an environmental leader), although they are not as high as in Colombia, are still a real possibility", reflected Vicente Ramdohr Arellano on the threats to environmental activists in Chile. Notwithstanding that, the number of deaths of environmental and social leaders is lower, they are still reported. In 2021, 49 organizations and environmental leaders signed a joined statement denouncing "intimidation, menaces and death threats" against environmental leaders in Chile.[52] In addition to this, litigation is used as a deterrent against environmental activists and leaders as well as researchers who ask for information on the projects which would affect sensitive economic interests. In this respect, it must be highlighted that judicial persecution and the open or veil threats of strategic lawsuit against public participation and/or the use of the State apparatus to sanction opposing groups to extractive projects are forms of judicial persecution. In a report on the criminalization of human rights defenders in the Americas, the Inter-American Commission on Human Rights states that it has observed in several countries in the Americas "the improper use of criminal law" against human rights defenders after they had been subject of public accusations for allegedly having committed a crime.[53] It must be highlighted that in a democratic society, the use of criminal measures should be the last resort because of their restrictive nature and their potential chilling effect on free speech.

4. CONCLUDING REMARKS

Notwithstanding the existence of legally binding mechanisms for participation in two of the case studies brought in this article, it was a common feature the existence of significant obstacles to this right for both Indigenous groups and local communities. Projected economic profit and the need to defend private interests of investors are two factors that are privileged over community rights. This could explain the unwillingness to engage with local and Indigenous perspectives regarding the future of extractive projects. Further, these negative attitudes by different authorities could be explained by a neoliberal vision of economic development.

The respondents interviewed for this article expressed that environmental leaders and researchers face significant problems to obtain information from projects that could have an impact on the future of local environments and their natural resources. Other obstacles to the realization of the right to participation and for Indigenous and local voices

[52] Fundación Terram, 'organizaciones medioambientales manifiestan su preocupación por los amedrantamientos y amenazas a líderes y profesionales que velan por el resguardo de los ecosistemas' (2021), April 05, 2021, <https://www.terram.cl/2021/04/organizaciones-medioambientales-manifiestan-su-preocupacion-por-los-amedrentamientos-y-amenazas-a-lideres-y-profesionales-que-velan-por-el-resguardo-de-los-ecosistemas/> accessed 03 December 2023.

[53] Inter-American Commission of Human Rights, 'Criminalización de la labor de las defensoras y los defensores de derechos humanos' (2015), Doc. 49/15, December 31, 2015, pp. 74-77.

to be included are a lack of channels of communication and recognition of Indigenous and social leaders as legitimate actors by the State representatives, the establishment of limited participation mechanisms, lack of transparency, deception by the State and private actors and, in the worse cases, judicial persecution and threats to the lives of environmental leaders. Paradoxically, a lack of accountability from extractive companies and State actors and the unwillingness to engage with communities contribute to societal inequality and in the long-term can cause environmental conflicts and a lack of legitimacy to the socio-economic system of governance.

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The author(s) solemnly declare(s) that this research has not involved any human subject (body or organs) for experimentation. It was not a clinical research. The contexts of human population/participation were only indirectly covered through literature review. Therefore, an Ethical Clearance (from a Committee or Authority) or ethical obligation of Helsinki Declaration does not apply in cases of this study or written work.

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The author(s) solemnly declare(s) that this research has not involved any animal subject (body or organs) for experimentation. The research was not based on laboratory experiment involving any kind animal. The contexts of animals not even indirectly covered through literature review. Therefore, an Ethical Clearance (from a Committee or Authority) or ethical obligation of ARRIVE does not apply in cases of this study or written work.

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The author(s) solemnly declare(s) that this research has not involved any Indigenous Peoples as participants or respondents. The contexts of Indigenous Peoples or Indigenous Knowledge are only indirectly covered, through literature review. Therefore, an Ethical Clearance (from a Committee or Authority) or prior informed consent (PIC) of the respondents or Self-Declaration in this regard does not apply in cases of this study or written work.

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(Optional) Research Involving Local Community Participants (Non-Indigenous)
The author(s) solemnly declare(s) that this research has not directly involved any local community participants or respondents belonging to non-Indigenous peoples. Neither this study involved any child in any form directly. The contexts of different humans, people, populations, men/women/children and ethnic people are only indirectly covered through literature review. Therefore, an Ethical Clearance (from a Committee or Authority) or prior informed consent (PIC) of the respondents or Self-Declaration in this regard does not apply in cases of this study or written work.

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